Neutral Citation Number: [2026] EAT 6

Case No: EA-2023-000240-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 January 2026

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

London Ambulance Service NHS Trust **Appellant**

- and –

Mr I Sodola (Debarred) **Respondent**

- -
- -

Adam Ross (instructed by Capsticks LLP) for the **Appellant**
No attendance or representation for the **Respondent**

Hearing date: 4 November 2025

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JUDGMENT

SUMMARY

Race Discrimination

The primary facts found by the Employment Tribunal could not logically lead to an inference that the respondent's delay in providing feedback about why the claimant had not been promoted was discriminatory. The decision not to promote the claimant was held not to be because of the claimant's race. The facts found could not reasonably lead to the conclusion that the delay in providing feedback was because of the claimant's race.

HIS HONOUR JUDGE JAMES TAYLER

The Issues

1. What are "facts from which the court could decide" that unlawful discrimination has occurred and what is meant by the term "any other explanation" for the purposes of section 136 **Equality Act 2010** ("**EQA**")? Those questions arise in this appeal in deciding whether there was any error of law in the determination of the Employment Tribunal that the respondent had directly discriminated against the claimant by delay in providing feedback after he was unsuccessful in an application for promotion. The appeal will involve consideration of whether the decision of the Supreme Court in **Efobi** means that anything said by an employer about the reason for treatment must be ignored at the first stage; and, if so, the practical consequences.

2. Fundamental to the appeal is the question of whether the primary facts found by the Employment Tribunal could logically lead to an inference that the respondent delayed in providing feedback about a promotion exercise (that itself was found not to be discriminatory) because of the claimant's race; such that the delay was an act of direct race discrimination, although the lack of promotion was not.

The appeal

3. The appeal is against the judgment of an Employment Tribunal, Employment Judge Braganza KC, sitting with members, after a hearing in December 2022. The judgment was sent to the parties on 31 January 2023.

The parties

4. The parties are referred to as the claimant and respondent as in the Employment Tribunal.

No attendance or representation for the claimant

5. The claimant was represented by a Solicitor, Mr C Ezike, in the Employment Tribunal. The respondent gave the details of Mr Ezike at Universe Solicitors as the contact for the claimant. The appeal was initially served by email using an incorrect email address referring to "universalsolicitors" as opposed to "universesolicitors". After some correspondence from the EAT had been sent to him

by post, Mr Ezike sent an email to the EAT on 13 August 2024. He explained the email address error and stated "I shall provide a response as soon as possible". No further correspondence was received from Mr Ezike.

6. An email stating that the EAT was considering debarring the claimant from participating in the appeal was sent to Mr Ezike. On 30 October 2024, the EAT sent a debarring order to Mr Ezike which was copied to the claimant's personal email address. No response was received. On 5 January 2025, the Notice of Hearing was sent to Mr Ezike, copied to the claimant's personal email address. Again, no response was received. The claimant is still employed by the respondent. I was informed that the email address used for the claimant in this appeal is the email address on their current employee records. In those circumstances, I concluded that it was appropriate to hear the appeal in the absence of the claimant.

The claim

7. The claimant commenced employment with NHS Direct in January 2013 as a 111 call service Health Advisor/Call Handler. His employment transferred to the respondent in November 2013. By 2020, the claimant's role was described as "Health Advisor/Pathway Trainer".

8. The claimant applied for a role as a Team Manager in April 2020. The Employment Tribunal noted that it was his fourth application for the job. The claimant contended that he was more qualified than white colleagues who had previously been appointed to the role. The claimant described himself as a black African man for the purposes of his race discrimination complaint.

9. The claimant advanced two complaints at the Employment Tribunal hearing. The first was that he was unsuccessful in his application for the Team Manager post following an interview on 26 May 2020. The second was that the respondent failed to provide written feedback until 23 August 2020. Both complaints were asserted to be less favourable treatment because of the claimant's race.

10. The claimant applied for the Team Manager post on 30 April 2020. The claimant and six other colleagues were shortlisted. The claimant was interviewed by Mrs Robinson, Team manager, and Ms Wallen, Deputy Site Lead, who was the chair of the panel. Mrs Robinson gave evidence. Ms Wallen

did not. The Employment Tribunal recorded that Mrs Robinson is white and Ms Wallen is black. The fact that Ms Wallen is black does not mean that she could not have discriminated against the claimant because of his race, although it might be thought to make it less likely.

11. The claimant scored 7/15. The four successful candidates are white. They scored 9/15, 10/15, 13/15 and 14/15. One of the other unsuccessful candidates is black and two are white.

12. Mrs Robinson contacted the claimant by telephone in early June 2020 and informed him that he was unsuccessful. The Employment Tribunal accepted his contention that he was given vague feedback that "you are a strong candidate, but other candidates are more qualified and experienced".

13. On 7 June 2020, the claimant wrote to the interview panel to request written feedback. On 8 June 2020, Ms Jones replied stating that once feedback had been completed a meeting would be arranged. On 9 June 2020, Ms Wallen sent an email stating that the interview notes had been stored and locked away by Mrs Robinson who would be returning from holiday on 22 June 2020. The Employment Tribunal stated "We were not provided with any reason as to why Ms Wallen could not have provided her feedback or why she did not explain that Mrs Robinson would provide hers on her return, adding to Ms Wallen's feedback".

14. The claimant sent a complaint on 25 June 2020, stating that he was expressing "BAME staff members' dissatisfaction at the level of procedural misconduct on the last team manager recruitment exercise" and that "Interview records were neither maintained nor stored as recorded by the procedure and this made it impossible to get a timely feedback for inclusion in complaint to even challenge the process". The claimant questioned the quality of feedback, the selection process, career progression and requested an investigation and review of the Team Manager recruitment exercise. The email was acknowledged the next day. A meeting to discuss the claimant's concerns was held on 18 August 2020.

15. The claimant received brief written feedback on 23 August 2020 from Mrs Robinson who stated "you came across as very confident - however did not answer the questions effectively - I recommend that you attend a workshop for interviewees which the Trust offer". The Employment

Tribunal held of the timing of the feedback:

> 77. The interview took place on 26 May 2020. The verbal feedback was provided in the first week of June. The Claimant was told on 7 June that Mrs Robinson was away until 22 June 2020. The eventual written feedback was on 23 August 2020, 2 months later. Mrs Robinson's explanation to the Tribunal was that she was away and not around very much but we accept her evidence that she worked around 22 shifts in the 3 months of June, July and August, which included her 14 days leave. We accept this would have been a very busy period due to the pandemic. She said she thought she sent the email and that it was in her draft box. In the email of 23 August 2020 she referred to thinking, she had already responded. She accepted there was a delay and explained the written feedback was the same as the verbal feedback. The Claimant would have been no wiser following receipt of the written feedback, as it added nothing to the verbal feedback.

The conclusions of the Employment Tribunal

16. The Employment Tribunal held that the burden of proof had passed to the respondent in respect of the non-appointment complaint but that the respondent had established that the reason that the claimant was not appointed was that he had scored less well than the successful candidates.

17. The Employment Tribunal upheld the complaint in respect of the delay in providing feedback:

> 114. On the second issue, which is whether the delay in providing feedback was because of the Claimant's race, the Claimant does not point to an actual comparator and **we considered whether a hypothetical, white comparator would have had their written feedback delayed**. There was **clearly poor practice in the significant delay** of some 3 months from the time of the interview, **but was this because of his race**?
>
> 115. **We considered whether, in the absence of an explanation for the delay, there was a prima facie case of less favourable treatment on grounds of race.** We found that **the delay was poor**, the **verbal feedback was bare**, the **response from Ms Wallen inadequate**, as **she could have provided some detail**, and we find that when eventually provided, **the very brief, written feedback gave no additional or meaningful detail**. We also note that this was **against the background that the Claimant had repeatedly applied before for the same role and repeatedly been unsuccessful**. **Constructive prompt feedback was of particular importance to him**.
>
> 116. This was also **against the background that after the selection process**, the Claimant, and **the Respondent, knew that he as a black man did not get the job**, **four white people were appointed** to **a position that at that time was filled with only other white staff**. He was **given bare verbal feedback** and, in the meantime, **repeatedly raised issues of the lack of recruitment of BAME staff** more widely; the **lack of diversity in management**; the **lack of career progression for his BAME colleagues, including for himself**; the **lack of written feedback** to him; and the **failure of the Respondent to comply with its own policies on storing its records**.
>
> 117. **Mrs Robinson worked 22 shifts in the period the Claimant was asking for his**

feedback, which, when it eventually arrived, was minimal. So **there was considerable time for her to have produced the notes, even after her return from leave in June**, **albeit we accept that this would have been a busy time due to the pandemic**. Ms **Wallen opted out, by deferring a reply** on written feedback to Mrs Robinson, even though Ms Wallen was the chair of the panel. **There is no explanation as to why she could not simply have provided her own feedback**. In addition, **the panel did not follow the procedure in its own policy as to the storing of the notes. Neither were the notes sent to HR.**

118. **We considered whether to draw adverse inferences from our primary findings of fact that in the absence of an explanation, the Claimant was treated less favourably because of his race**. We find **for the reasons set out above**, including that **the Respondent avoided giving feedback**, that **there is a prima facie case** to answer. **The burden of proof therefore shifts to the Respondent** and we considered the explanation. We find that the explanation given is that Mrs Robinson was initially away, then delayed due to the pressures of the pandemic and, in the meantime, the papers were locked away. Mrs Robinson did apologise for the delay and explain that she thought she had responded. There is no explanation for how Ms Wallen chose to reply to the Claimant.

119 Has the Respondent discharged the burden of proof? **We find that against the serious grievance brought by the Claimant, which featured in the background and concerned the lack of career progression for Black and Minority Ethnic staff**, and which was triggered by the Claimant not being appointed on this last round, **there was a shying away from engaging with the Claimant on his feedback**. He was **not even given the interview notes or the content of the feedback within the notes**, including that he had not provided examples in answer to the questions, until after he brought these proceedings.

120 The Respondent knew that the Claimant had been asking for feedback from the time he was told that he had been unsuccessful. **Both the panel that interviewed him and those dealing with his official complaint were aware of his repeated requests for feedback.** In her email of 8 June 2020, **Ms Jones specifically referred to not meeting the Claimant until he received his feedback**. Mrs Robinson was copied into this email [383].

121 **The Respondent was aware that the Claimant had raised that there was a wider systemic issue in the lack of diversity in management. It initiated an investigation into this. Only white candidates were recruited on the latest selection exercise**. The written feedback, in identical terms to the verbal feedback, was within Ms Wallen and Mrs Robinson's possession from the outset. Ms Wallen could have dealt with this but refused to. Mrs Robinson relied on delays in general terms and thinking she had sent it. When the feedback was provided, there was no change to it from the verbal feedback. It described in general terms that the Claimant "did not answer the questions effectively" without stating he did not give examples. That gave the Claimant no further understanding on why he had not been appointed. It demonstrated an unhelpful approach and undermined the explanation for the delay of 3 months in replying to him.

122 **For those reasons, we find the Respondent has failed to adduce cogent reasons for the delay. We do not accept that the explanation was in no way because of the**

> **Claimant's race.** The Respondent had the feedback from the day of the interview on 26 May 2020 and **even though the Claimant was clearly concerned about receiving this, the Respondent delayed providing what was eventually of minimal value**, as it simply repeated the initial verbal feedback. [emphasis added]

The relevant legal principles

18. Section 136 **EQA** provides:

> 136 Burden of proof
>
> (1) This section applies to **any proceedings relating to a contravention of this Act**.
>
> (2) If there are **facts from which the court could decide**, in the **absence of any other explanation**, that a **person (A) contravened the provision** concerned, the court **must hold that the contravention occurred**.
>
> (3) But **subsection (2) does not apply** if **A shows that A did not contravene the provision**. [emphasis added]

19. The respondent focused in this appeal on the distinction between "facts" and "explanation" and what was said by Lord Leggatt in **Efobi v Royal Mail Group Ltd** [2021] UKSC 33, [2021] ICR 1263 which the respondent contends means that on a section 136 **EQA** analysis anything that amounts to an "explanation" or lack thereof, which includes anything said about the reason for the claimant's treatment at any time, must be ignored at stage one.

20. If I were to construe section 136 **EQA** free from authority that would not be my construction. Section 136 **EQA** begs two questions. The first is what is meant by the term "explanation". The second is why does the provision use the term "any other" explanation; "other" to what? I consider the natural meaning of the words is an explanation that establishes why the treatment was other than discriminatory - where the employee has established facts from which discrimination could be inferred, an explanation why, despite those facts, the reason for the treatment was not discrimination.

21. The predecessor provision in section 54A **Race Relations Act 1976** referred to an "adequate explanation" which again suggests an explanation that is adequate to establish that the treatment was not discriminatory. In **Efobi** the Supreme Court held that the change of wording did not change the meaning of the provision but was designed only to clarify that the reason established need only be one that is not discriminatory, rather than one which satisfied some objective standard of

reasonableness or acceptability.

22. In **Laing v Manchester City Council** [2006] ICR 1519, EAT, Elias J (P) stated:

> 51. We note in particular three features of this section. **First, the onus is on the complainant to prove facts from which a finding of discrimination, absent an explanation, could be foun**d. Second, by contrast, **once the complainant lays that factual foundation, the burden shifts to the employer to give an explanation** . The latter suggests that **the employer must seek to rebut the inference of discrimination by showing why he has acted as he has**. That **explanation must be adequate**, which as the courts have frequently had cause to say **does not mean that it should be reasonable or sensible** but simply that **it must be sufficient to satisfy the tribunal that the reason had nothing to do with race**: see *Glasgow City Council v Zafar* [1998] ICR 120 and *Bahl v The Law Society* [2004] IRLR 799. …
>
> 60. Second, **the obligation for the employer to provide an *explanation* once the prima facie case has been established, strongly suggests that he is expected to provide a reason for the treatment. An explanation is just that; the employer must explain. Why has he done what could be considered to be a racially discriminatory act? It is not the language one would expect to describe facts that he may have adduced to counter or put into context the evidence adduced by the claimant**. …
>
> 76. Whilst, as we have emphasised, it will usually be desirable for a tribunal to go through the two stages suggested in *Igen*, it is not necessarily an error of law to fail to do so. There is no purpose in compelling tribunals in every case to go through each stage. They are not answering an examination question, and nor should the purpose of the law be to set hurdles designed to trip them up. The reason for the two-stage approach is that there may be circumstances where it would be to the detriment of the employee if there were a prima facie case and no burden was placed on the employer, because they may be imposing a burden on the employee which he cannot fairly be expected to have discharged and which should evidentially have shifted to the employer. **But where the tribunal has effectively acted at least on the assumption that the burden may have shifted, and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever**.
>
> 77. Indeed, it is important to emphasise that it is not the employee who will be disadvantaged if the tribunal focuses only on the second stage. Rather the risk is to an employer who may be found not to have discharged a burden which the tribunal ought not to have placed on him in the first place. That is something which tribunals will have to bear in mind if they miss out the first stage. **Moreover, if the employer's evidence strongly suggests that he was in fact discriminating on grounds of race, that evidence could surely be relied on by the tribunal to reach a finding of discrimination even if the prima facie case had not been established. The tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to let form rule over substance.** … [emphasis added]

23. That analysis fits with the "other explanation" being one that shows that the treatment was not

discriminatory.

24. In **Birmingham City Council, Mrs S Semlali v Mrs P Millwood** UKEAT/0564/11/DM Langstaff J (P) held:

> 25. It seems to us that two issues arise for our determination. The first is whether as a matter of law Mr Beever is correct in his submission that whatever the explanations advanced for the treatment of the Claimant and however inadequate or wrong they might be, the Tribunal could not simply upon the basis of the difference in race and status coupled with the inadequacies of the excuses proffered regard the burden of proof as shifting. If he is right in that submission, then the appeal must succeed and the claim must be dismissed. If he is wrong in that submission, we have to ask whether the Tribunal by asking for "something more" identified that which Mr Swanson submits they did: that there had here been a number of rejected explanations put forward for consideration. We approach this question by remembering that the purpose of the provisions is to identify a proper claim of discrimination, recognising that it is highly unlikely in the real world that there will be any clear evidence that that has occurred. The inference will have to be drawn if a claim for discrimination is to succeed at all. **Though a difference in race and a difference in treatment to the disadvantage of the complainant is insufficient and something more is required, Mr Beever was prepared to accept that where as part of the history that the Tribunal was examining an employer had at the time of the alleged discriminatory treatment given an explanation for it which a Tribunal was later to conclude was a lie, that might, coupled with the difference in race and treatment, justify a reversal of the burden of proof. We agree.**
>
> 26. What is more problematic is the situation where there is an explanation that is not necessarily found expressly to be a lie but which is rejected as opposed to being one that is simply not regarded as sufficiently adequate. Realistically, it seems to us that, in any case in which an employer justifies treatment that has a differential effect as between a person of one race and a person or persons of another by putting forward a number of inconsistent explanations which are disbelieved (as opposed to not being fully accepted), there is sufficient to justify a shift of the burden of proof. Exactly that evidential position would have arisen in the days in which King v Great Britain-China Centre [1992] ICR 516 was the leading authority in relation to the approach a Tribunal should take to claims of discrimination. **Although a Tribunal must by statute ignore whether there is any adequate explanation in stage one of its logical analysis of the facts, that does not mean, in our view, to say that it can and should ignore an explanation that is frankly inadequate and in particular one that is disbelieved.**

25. **Millwood** was considered by Heather Williams QC, then sitting as a Deputy Judge of the High Court, in **Raj v Capita Business Services Ltd and another** [2019] IRLR 1057:

> 60 **The question must be whether in context, the rejection of the particular part of the Respondent's account could properly enable a Tribunal to infer that the protected characteristic was the reason for/related to the conduct complained of**. Firstly, it is clear that Langstaff J's own analysis contained caveats ('that might, coupled with the difference in race and treatment, justify a reversal of the burden of proof').

> 61 Secondly there is a distinction between the present instance and the kind of situation that was before the EAT in Millwood **where the Claimant had shown there was less favourable treatment by the Respondent between herself and another employee in sufficiently similar circumstances who did not have her protected characteristic; it is not difficult to see why in that context if a Tribunal also finds that a Respondent has put forward an untrue account as to what occurred or why it occurred, it is something taken with the evidence of less favourable treatment, that may well be sufficient to satisfy stage one and shift the burden of proof.**

26. In **Base Childrenswear Ltd v Otshudi** [2019] EWCA Civ 1648, [2020] IRLR 118, Underhill LJ accepted that an Employment Tribunal was entitled to consider that the burden had passed to the respondent to disprove discrimination based on the following facts:

> 27 The Tribunal's reasons for finding a prima facie case appear in the second half para 156 but should be read in the context of its earlier findings and observations. I think they can be summarised as follows:
>
> (a) Mr Granditer's strong and 'intimidatory' reaction to the Claimant's allegation of discrimination, in a context where **he knew he had given a false reason for the dismissal** – as I understand it, the point is that he 'protested too much';
>
> (b) his refusal to address the Claimant's grievance;
>
> (c) **his persistence in advancing a false reason for the dismissal** in the ET proceedings, even when the supposed reason for the original lie (to 'minimise confrontation') was evidently no longer operative.
>
> **Those matters are said to indicate that Mr Granditer was 'trying to cover up what was a dismissal which was tainted by considerations of the Claimant's race'.** That must, I think, mean that (at least at some level) he realised that race had played a part in his decision.
>
> 28 The Tribunal's conclusion in s 136(2) transferred the burden to the Respondent to show that no unlawful harassment had occurred. In the context of this case that meant showing that the reason for the dismissal was one in which the Claimant's race played no part.

27. These authorities suggest that where an employer has given inconsistent or demonstrably false reasons for treatment this might be relevant at the first stage of a section 136 **EQA** analysis.

28. Subject to whether I am bound by **Efobi** to find otherwise, I would analyse the situation as follows. If at the time the employer has given an employee inconsistent reasons for the treatment, reasons that are manifestly untrue or has not provided any reasons to the claimant when they have been given to others of a different race, those are facts that could be relevant at the first stage in

determining whether an inference of discrimination could be drawn, absent any other explanation. If an employer gave a reason at the time of the treatment that suggests discrimination, such as we thought you would not "fit in" or you are "not one of us", it seems illogical to me to exclude that from consideration of whether the burden of proof has shifted at the first stage. Even where such reasons have been given at the time of the treatment it is possible that some non-discriminatory explanation could still be advanced, but the burden would firmly be on the respondent to do so. The statute does not state that any "explanation" must be ignored at the first stage, but that any "other explanation" must be ignored; or what in the predecessor provisions was referred to as the lack of an "adequate explanation". It is probably better to refer to anything the respondent may have said about the treatment as a "reason" rather than an "explanation". A decision made by an Employment Tribunal about what the employer did or did not say about its reason for treating an employee as it did is a finding of fact that can generally only be challenged on perversity grounds. Subject to what is said in **Efobi**, I can see no reason why such findings of facts cannot be considered at the first stage, providing they are not an "other explanation" as to why the treatment is not discriminatory. It may not always be easy to draw the dividing line between findings of fact about what was said about the treatment by the respondent at the time (such as false or inconsistent reasons), from which an inference of discrimination potentially might be drawn, as opposed to any "other explanation", that must be ignored at the first stage. I would be inclined to think where that line is to be drawn is a matter for the good sense and appreciation of the Employment Tribunal.

29. The authorities I have so far quoted predate **Efobi**. In one authority that postdates **Efobi** HHJ Auerbach applied a similar analysis to that which I prefer, in **Jaleel v Southend University Hospital NHS Foundation Trust** [2023] EAT 10:

> 40. Next, while the authorities indicate that **the employer's substantive explanation for conduct generally does not fall to be considered at the first stage of deciding whether the burden shifts, if the tribunal considers that it has put forward inconsistent explanations, or an untrue or problematic explanation, that may be taken into account by it as something that could support an adverse inference and causes the burden to shift. *Otshudi* was an example of that.** Once again, however,

> this is not a rule of law or automatic consequence, but a fact and context-sensitive matter, for the appreciation of the tribunal, a point recently reiterated by the EAT in *Raj v Capita Business Services Limited* [2019] IRLR 1057.

30. Mr Ross, for the respondent, contends that this is incorrect as a matter of law because it is contrary to statements of Lord Leggatt in **Efobi**.

31. In **Efobi** the key issue was whether the change in wording from the predecessor provisions to section 136 **EQA** meant that at the first stage the burden was no longer on the claimant to establish facts from which discrimination could be inferred. The Supreme Court held that there was no change in meaning from the predecessor provisions. The Supreme Court stated that whether the absence of evidence from a decision maker could result in an inference of discrimination was a matter for the appreciation of the Employment Tribunal. There had been no error of law in the Employment Tribunal concluding that the burden had not passed to the respondent to disprove discrimination in the circumstances of the case, despite the fact that the decision makers had not been called. **Efobi** was a case in which no explanation had been provided by the employer. It was not a case in which inconsistent reasons or manifestly false reasons for treatment had been given; or where at the tine of the treatment the employer had given the claimant no reason for the treatment but had provided reasons to others of a different race. I consider it is important to analyse what Lord Leggatt said in that context. However, I accept that he referred to the exclusion of an explanation for treatment in forthright terms at a number of sections of his judgment.

32. At paragraph 15, when considering the predecessor provisions he stated:

> 15. **The rationale for placing the burden on the employer at the second stage is that the relevant information about the reasons for treating the claimant less favourably than a comparator is, in its nature, in the employer's hands**. A claimant **can seek to draw inferences from outward conduct** but **cannot give any direct evidence about the employer's subjective motivation**—not least since, as Lord Browne-Wilkinson observed in *Glasgow City Council v Zafar* [1998] ICR 120, 125 : "those who discriminate … do not in general advertise their prejudices: indeed they may not even be aware of them." On the other hand, **it would be unduly onerous to require an employer to disprove a mere assertion of discrimination**. The aim of the old provisions was accordingly to strike a fair balance by requiring proof of primary facts from which, in the absence of explanation, an inference of discrimination could be drawn; but then, if that hurdle is surmounted, requiring the employer to prove that there has been no contravention of the law. As Advocate General Mengozzi said

in *Meister v Speech Design Carrier Systems GmbH* (Case C-415/10) [2012] ICR 1006, para 22 , in explaining the approach to the burden of proof taken in the European Directives which the old provisions were intended to implement:

> "A measure of balance is therefore maintained, enabling the victim to claim his right to equal treatment but preventing proceedings from being brought against the respondent solely on the basis of the victim's assertions." [emphasis added]

33. I do not consider that passage is incompatible with my preferred analysis, because the key distinction that is drawn is between "outward conduct" and "subjective motivation". If the employer has made inconsistent statements or manifestly false statements about the reason for the treatment at the time it occurred, or in its aftermath, I see no difficulty in analysing that as being "outward conduct" rather that constituting some other explanation through which the employer seeks to establish that the subjective motivation was not discriminatory.

34. At paragraph 22, Lord Leggatt stated:

> 22. Elias J emphasised in this context the distinction between "facts" and "explanation". In *Igen Ltd v Wong* the Court of Appeal had made it clear that, in considering **at the first stage of the analysis what inferences or conclusions can be drawn from the primary facts, the tribunal must ignore any explanation for those facts given by the respondent and assume that there is no adequate explanation for them**: see paras 21–22 and also para (6) of the guidance annexed to the judgment. **That assumption is required by the statutory wording and is necessary to ensure that the claimant does not end up having to disprove an explanation advanced by the respondent at the first stage, which would defeat the object of the split burden of proof**. In Laing , however, Elias J said (at para 60):
>
>> "the obligation for the employer to provide an explanation once the prima facie case has been established, strongly suggests that he is expected to provide a reason for the treatment. An explanation is just that; the employer must explain. **Why has he done what could be considered to be a racially discriminatory act?** It is not the language one would expect to describe facts that he may have adduced to counter or put into context the evidence adduced by the claimant." (Emphasis in original.)
>
> Thus, in Laing it was held that the employment tribunal had been entitled to rely at the first stage on evidence adduced by the employer that the manager whose conduct was complained of had indiscriminately treated all subordinates in an abrupt fashion, irrespective of their race (see para 57). [emphasis added]

35. I do not consider that this section of the analysis precludes any consideration of facts that may relate to the reason for treatment - what must be ignored is what is said by the employer about the subjective motivation for the treatment, which would only be relevant if the second stage was reached,

to assert that the treatment was not discriminatory.

36. At paragraph 23 Lord Leggatt stated:

> 23. In *Madarassy* [2007] ICR 867 the Court of Appeal endorsed this approach. Mummery LJ (with whose judgment Laws and Maurice Kay LJJ agreed) said at para 71:
>
> > " Section 63A(2) [of the Sex Discrimination Act 1975] does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; **or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy**."
>
> **I comment in passing that the last of the possibilities mentioned in this passage must refer to facts which indicate that, even if there has been less favourable treatment of the complainant, this was not on the ground of her sex or pregnancy. It should not be read as diluting the rule that evidence of the reason for any such less favourable treatment cannot be taken into account at the first stage.** [emphasis added]

37. I consider that this passage demonstrates that there may be "facts" that point towards or away from discrimination. When at the end of the passage Lord Leggatt refers to "the rule that evidence of the reason for any such less favourable treatment cannot be taken into account at the first stage", that is a reference to any explanation; i.e. the subjective motivation of the decision maker.

38. Having concluded that the change in wording from that in the predecessor provisions to that in section 136 **EQA** did not result in any change of meaning, Lord Leggatt went on to consider the analysis of the Employment Tribunal:

> Application to this case
>
> 35. The employment tribunal in this case summarised the law as regards the burden of proof as follows:
>
> > "It was for the claimant to prove facts from which the tribunal could conclude that there was discrimination. Subject to that it would fall for the respondent to prove that there was no unlawful discrimination. In the event that the claimant satisfied the burden of proof upon him, then absent an innocent explanation

> which was accepted by the tribunal his claim(s) would succeed."
>
> 36. **It cannot be said that this was a very satisfactory summary of the law. In particular, it did not make clear that any explanation given by the respondent must be ignored at the first stage.** It is safe to assume that the tribunal was well aware of that point, however, not least because it was spelt out in the respondent's written submissions to the tribunal.

39. I do not consider that the passage goes further than reiterating that at the first stage the Employment Tribunal acts on the assumption that the respondent has not advanced any other explanation for the treatment.

40. The passage in **Efobi** upon which the respondent placed the greatest reliance was that at paragraph 40. On one reading I can see why Mr Ross, for the respondent, asserts that anything said, or not said, by the respondent about the reason for the treatment must be ignored at the first stage. The respondent contends that at the first stage the Employment Tribunal must in all circumstances ignore whether the employer has offered an explanation and, if so, what the explanation is, or that no explanation has been provided. I consider that paragraph 40 has to be seen in the context of the proceeding paragraphs:

> The adverse inference issue
>
> 39. **At the hearing in the employment tribunal Royal Mail did not adduce evidence from anyone who had actually been responsible for rejecting any of the claimant's job applications.** Instead, they called as witnesses two managers who were familiar with the recruitment processes and how in general terms appointments were made. Those witnesses sought to explain the likely reasoning processes of the recruiters but they could not say what the actual reasons for the relevant decisions were. The claimant's second ground of appeal is that the tribunal should have drawn adverse inferences from the failure to call the actual decision-makers. Counsel for the claimant further submits that the Court of Appeal wrongly held that drawing any such adverse inference was impermissible, when Sir Patrick Elias said at para 44:
>
> > "**If the employer fails to call the actual decision-makers, he is at risk of failing to discharge the burden which arises at the second stage, but no adverse inference can be drawn at the first stage from the fact that he has not provided an explanation** as Mummery LJ said in terms in para 58 of *Madarassy* …"
>
> What Mummery LJ said in para 58 of *Madarassy* [2007] ICR 867 was:
>
> > "**The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case**

> **of discrimination by the respondent.** The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage."

> 40. I think that care is needed in interpreting these statements. **At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account.** It follows that, as Mummery LJ and Sir Patrick Elias said in the passages quoted above, **no adverse inference can be drawn at the first stage from the fact that the employer has not provided an explanation.** In so far as the Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931, paras 21–22 can be read as suggesting otherwise, that suggestion must in my view be mistaken. **It does not follow, however, that no adverse inference of any kind can ever be drawn at the first stage from the fact that the employer has failed to call the actual decision-makers. It is quite possible that, in particular circumstances, one or more adverse inferences could properly be drawn from that fact.**

> 41. The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. **So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances.** Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.

> 42. **There is nothing in the reasons given by the employment tribunal for its decision in this case which suggests that the tribunal thought that it was precluded as a matter of law from drawing any adverse inference from the fact that Royal Mail did not call as witnesses any of the actual decision-makers who rejected the claimant's many job applications. The position is simply that the tribunal did not draw any adverse inference from that fact. To succeed in an appeal on this ground, the claimant would accordingly need to show that, on the facts of this case, no reasonable tribunal could have omitted to draw such an inference.** That is, in its very nature, an extremely hard test to satisfy. [emphasis added]

41. This passage demonstrates that Lord Leggatt was considering whether an inference could be drawn from the fact that decision makers had not been called to give evidence as a result of which no

explanation had been provided as to why the claimant was unsuccessful in his applications. Lord Leggatt concluded that an inference could in appropriate circumstances be drawn from the fact that a decision maker did not give evidence, but that there was no error of law in the Employment Tribunal failing to do so in the circumstances of the case. The case was not about an employer having given false or inconsistent reasons for treatment or not giving reasons to a claimant but providing them to others of a different race. I do not accept that Lord Leggatt held that any primary findings of fact the Employment Tribunal made about anything said, or not said, about the reason for treatment by the respondent could never be relevant at the first stage.

42. Section 136 **EQA** is fundamentally about assuming that there is no non-discriminatory explanation at the first stage, rather than ignoring anything that was said by he employer at the time of the treatment. In **Hewage v Grampian Health Board** [2012] UKSC 37, [2012] ICR 1054 Lord Hope stated at paragraph 31:

> **The assumption at that stage, in other words, is simply that there is no adequate explanation.** There is no assumption as to whether or not a prima facie case has been established. The wording of sec 63A(2) of the 1975 Act and sec 54A(2) of the 1976 Act is quite explicit on this point. The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. **So the prima facie case must be proved, and it is for the claimant to discharge that burden.**

43. If I am wrong in my analysis above, and anything said by the employer that relates to the reason for treatment must be ignored at the first stage when applying section 136 **EQA**, it probably makes relatively little difference. If the respondent has given false or inconsistent reasons for the treatment, or has failed to give any reason when reasons have been provided to employees of a different race, that might be relied on in a **King v Great Britain China Centre** [1992] 516 analysis, as was applied before the burden of proof provisions were introduced, as a result of which the Employment Tribunal would look to the employer to provide a non-discriminatory explanation for the treatment. That would be a little surprising as it would mean that a provision designed to make it easier for an employee to prove discrimination in certain circumstances made it more difficult to do

so, but it is a possible analysis, if not the one I favour. Where such primary findings of fact arise it is probably wise for an Employment Tribunal to analyse them on a Section 136 **EQA** and **King** basis in the alternative.

44. Whatever the analysis, the Employment Tribunal should focus on whether the facts that it has found suggest the possibility of unlawful discrimination because of the relevant protected characteristic. In **Madarassy** the Court of Appeal stated that "could conclude" must mean "a reasonable tribunal could properly conclude" on a consideration of all of the evidence. In **Laing** Elias J (P) stated "the focus of the tribunal's analysis must at all times be the question whether they can properly and fairly infer race discrimination".

The Grounds of Appeal

The challenges to the Employment Tribunal's direction as to the law and application of the legal tests

> **Ground 1: the Tribunal misdirected itself as to the burden of proof provision at Section 136(2) EqA**
>
> 1. At §95, the Tribunal said, "it may be appropriate on occasion, for the Tribunal to take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof", without directing itself as to the limited circumstances where that is permissible.
>
> 2. The Tribunal's self-direction failed to distinguish between taking into account an explanation and taking into account the absence of an explanation.

45. The Employment Tribunal stated in its direction as to the law, after specifically directing itself as to section 136 **EQA**, that:

> 95. **It may be appropriate on occasion, for the Tribunal to take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case** so as to shift the burden of proof. *Laing v Manchester CCC & others* [2006] IRLR 748; *Madarassy*. **It may also be appropriate for the Tribunal to go straight to the second stage, where for example the respondent assert that it has a non-discriminatory explanation for the alleged discrimination**. [emphasis added]

46. On a proper reading of the judgment, when the Employment Tribunal referred to taking "into account the respondents' explanation" at the first stage, it was referring to any reason it has given for

the treatment that might support the drawing of an inference, as opposed to any "other explanation" that might disprove discrimination. The fits with the reference in the second sentence to a "non-discriminatory explanation" at the second stage of a section 136 **EQA** analysis.

47. Further, the Employment Tribunal did not in the circumstances of the case focus on any reasons for the treatment given by the respondent at the first stage, directing itself specifically at the first stage the analysis was to be on the assumption that there was no explanation for the treatment: "We considered whether, in the absence of an explanation for the delay, there was a prima facie case of less favourable treatment on grounds of race" and at paragraph 118 "We considered whether to draw adverse inferences from our primary findings of fact that in the absence of an explanation, the Claimant was treated less favourably because of his race". I do not accept that the Employment Tribunal erred in its direction as to the law in any material sense.

> **Ground 2: the Tribunal misapplied Section 136(2) EqA**
>
> 3. At §§67, 115 and 117, the Tribunal impermissibly considered the absence of an explanation from the Respondent when determining whether there was a prima facie case of direct discrimination (race).
>
> 4. At §118, the Tribunal drew adverse inferences from its primary findings of fact but failed to state what those inferences were. Before doing this, the Tribunal appears to have already concluded that the burden of proof had shifted.

48. The respondent contends that the Employment Tribunal relied on the absence of an adequate explanation from Ms Wallen for delaying in provision of feedback at the first stage of deciding whether the burden of proof had shifted. In its findings of fact the Employment Tribunal stated:

> 66. On 9 June 2020 [346] Ms Wallen replied to the Claimant and Mrs Robinson that the "The interview notes have been stored away safely and Gina [Mrs Robinson] has the key. She is back on the 22nd June so will e-mail you then".
>
> 67. We find this was an unhelpful response. Ms Wallen was the chair of the panel and the most senior of the two, and the Claimant wrote to both of them. **It is also contrary to what the Respondent's policy requires at paragraph** 17.6 [181] that all "interview notes together with all other recruitment documentation must be returned to the Recruitment Department (either in hard copy or scanned and emailed) and will be maintained in line with TP/030 Records". The Tribunal accepts that the Claimant may have taken from this, a reluctance to engage with him. He made a reasonable request. Ms Wallen in her score sheet had set out he was much improved and needed to improve his skills, which he could do with some training. **We were not provided**

> **with any reason as to why Ms Wallen could not have provided her feedback or why she did not explain that Mrs Robinson would provide hers on her return, adding to Ms Wallen's feedback.** [emphasis added]

49. The Employment Tribunal returned to this in their analysis of why the burden shifted quoted above. On a proper analysis I consider that the Employment Tribunal concluded that the delay in Ms Wallen providing feedback was contrary to the respondent's policy and that there was nothing that would have prevented it being provided earlier. I do not accept that involved the Employment Tribunal taking account of the lack of an "other explanation", in the sense of one negating discrimination, in deciding that the burden of proof had shifted.

> **Ground 3: the Tribunal erred in its approach to the hypothetical comparator**
>
> 5. At §114, the Tribunal identified a hypothetical white male comparator, but did not set out their circumstances, so as to ensure a valid comparison exercise, or make findings as to how they would have been treated.

50. On a proper analysis of the judgment as a whole I consider it is clear that the Employment Tribunal considered whether an inference should be drawn that the delay in providing feedback was materially influenced by the claimant's race. The analysis did not significantly rely on a hypothetical comparator. When the Employment Tribunal referred to considering "whether a hypothetical, white comparator would have had their written feedback delayed" it was doing no more than stating that it was looking for material from which an inference could be drawn. If there was such material and the respondent failed to provide some "other explanation" it would draw an inference of discrimination; that the claimant would have been treated differently if he had been white. The analysis was not based on a detailed construction of a hypothetical comparator as an analytical tool. The Employment Tribunal was doing little more than reminding itself it was looking for evidence of discrimination.

Conclusion on the first three grounds of appeal

51. I have concluded that the Employment Tribunal did not misdirect itself in law or misapply the relevant legal principles.

The challenges to the analysis of the Employment Tribunal

52. The final two grounds, that I will deal with together, challenge the analysis of the Employment

Tribunal. The types of error of law that can relate to factual findings were summarised by Lady Haldane in **Granger v Scottish Fire & Rescue Service** [2025] EAT 90:

> 29. As to the role of the EAT in appeals such as the present one, under section 21 of the Employment Tribunals Act 1996 an appeal to the Employment Appeal Tribunal lies only on a question of law. Useful guidance as to the proper approach is found in the judgment of the Court of Appeal in *R (Iran) v SSHD* [2005] EWCA Civ 982 at [9], where examples of errors of law are given and include: i) **making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");** ii) failing to give reasons or any adequate reasons for findings on material matters; iii) **failing to take into account and/or resolve conflicts of fact or opinion on material matters**; iv) **giving weight to immaterial matters**; and, v) making a material misdirection of law on any material matter. [emphasis added]

53. The limited scope for challenges to decisions of an Employment Tribunal was emphasised by the Court of Appeal in **DPP Law Ltd v Greenberg** [2021] IRLR 1016.

54. In **Efobi** Lord Leggatt stated that:

> 43 Where it is said that an adverse inference ought to have been drawn from a particular matter - here the absence of evidence from the decision-makers - **the first step must be to identify the precise inference(s) which allegedly should have been drawn.** [emphasis added]

55. In this appeal it is important to have in mind the specific inference the Employment Tribunal concluded could be drawn from the primary findings of fact. The Employment Tribunal held that the respondent delayed in providing feedback to the claimant because of his race. The reference the Employment Tribunal made to a hypothetical comparator emphasised that it was considering whether there was any reason to think that the claimant would have received feedback more speedily had he been white. The oddity of the conclusion of the Employment Tribunal was that having found that the burden had shifted to the respondent to establish that the rejection of the claimant's application for promotion was in no sense whatsoever because of his race, it found that the burden was discharged, because he failed in the application because he genuinely scored lower than the successful candidates. However, the delay in providing feedback, about that non-discriminatory decision, was itself because of the claimant's race. A white employee would have received feedback more rapidly.

56. I will consider grounds 4 and 5 together.

Ground 4: the Tribunal erred by taking into account irrelevant factors when

concluding, at §118, that there was a prima facie case to answer:

6. At §115, the Tribunal relied on the fact that the Claimant had repeatedly applied for the same role and been unsuccessful and the fact that constructive prompt feedback was of particular importance to him without making findings of fact as to what the alleged discriminators (Mrs Robinson and Ms Wallen) knew of those matters.

7. The Tribunal relied on matters with no obvious relevance in establishing a prima facie case that the Claimant's race (in part) motivated delay by the alleged discriminators in providing written feedback:

a. his application history and desire for prompt feedback (§115, as above);

b. that he is black, while those who were appointed (and those who were already in post) were white (§116);

c. that he had "repeatedly raised issues of the lack of recruitment of BAME staff more widely; the lack of diversity in management; the lack of career progression for his BAME colleagues, including for himself; the lack of written feedback to him; and the failure of the Respondent to comply with its own policies on storing its records" (§116); and

d. "the Respondent avoided giving feedback" (§118).

Ground 5: the Tribunal erred in law by taking into account irrelevant factors when concluding, at §122, that the burden had not been discharged:

8. The Tribunal focussed in its reasons on matters that may be relevant to a complaint of victimisation but were irrelevant to the claim of direct discrimination before it, in finding:

a. "against the serious grievance brought by the Claimant, which featured in the background and concerned the lack of career progression for Black and Minority Ethnic staff, and which was triggered by the Claimant not being appointed on this last round, there was a shying away from engaging with the Claimant on his feedback" (§119); and

b. "the Respondent was aware that the Claimant had raised that there was a wider systemic issue in the lack of diversity in management." (§121).

57. I have concluded that the Employment Tribunal did take account of irrelevant factors in its analysis. The claimant might have brought a complaint that the delay in his feedback was an act of victimisation because he had complained of discrimination, but that was not a complaint before the Employment Tribunal. Much of the analysis might have been relevant to a victimisation complaint but did not logically suggest direct race discrimination in the delay in providing feedback. What the Employment Tribunal had to consider was whether its primary findings of fact were such that it

reasonably could conclude that the reason for the delay in providing feed back was because of the claimant's race.

58. I do not consider that the primary findings of fact; that "the delay was poor", the "verbal feedback was bare", that the "response from Ms Wallen inadequate", that the "the very brief, written feedback gave no additional or meaningful detail", that there was "no explanation as to why she [Ms Wallen] could not simply have provided her own feedback" or that the respondent did not "comply with its own policies on storing its records" could reasonably lead to the conclusion that the reason for the delay in providing the feedback was because of the claimant's race. These were essentially descriptions of the treatment about which the claimant complained. They might have been relevant to a complaint of victimisation but that was not before the Employment Tribunal. They might have been relevant to the complaint that the rejection of the claimant's application for promotion was direct discrimination, but the Employment Tribunal concluded that despite the burden of proof having shifted to the claimant on that complaint, it had been discharged.

59. The Employment Tribunal relied on the respondent's knowledge of the claimant's application history and his desire for prompt feedback as a reason why the burden shifted. I have concluded that is irrelevant to the question of whether the feedback was delayed because of his race. The Employment Tribunal relied on the fact that the claimant is black, while those who were appointed (and those who were already in post) were white. That was material to the burden of proof shifting in the lack of promotion complaint, but not to whether the delay in providing feedback was because of the claimant's race. The fact that the claimant had raised "issues of the lack of recruitment of BAME staff", a "serious grievance" and "a wider systemic issue in the lack of diversity in management" might have been relevant to a victimisation complaint, but was not to the assertion that feedback was delayed because of the claimant's race. The analysis of the Employment Tribunal was based on factors that did not logically suggest that the delay in providing feedback to the claimant could have been because of his race.

Disposal

60. I have concluded that this is one of those cases in which there is only one possible answer. The primary facts found by the Employment Tribunal could not reasonably support a finding that the reason for the delay in the provision of feedback to the claimant was because of his race. The burden did not shift to the respondent and so the appeal is allowed and the finding of discrimination set aside.